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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. ....

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *Petitioner*

v.

PAN AMERICAN PETROLEUM CORPORATION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, Pennsylvania Public U y Commission, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on December 30, 1964.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit (Appendix A, *infra*, pp. 1a-4a) is reported at 339 F. 2d 694. The opinion and orders of the Federal Power Commission (R. 2152-2166, 2223-2224)[1] are reported at 30 FPC 1477 and 31 FPC 241.

[1] "R" refers to the record page numbers in the Joint Appendix used in the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals was entered on December 30, 1964 (Appendix B, *infra*, p. 5a). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTION PRESENTED

Whether the transfer of a leasehold interest in proven natural gas reserves to an interstate pipeline company for use by the pipeline company in supplying its interstate markets constitutes "a sale of natural gas" subject to the jurisdiction of the Federal Power Commission.

STATUTE INVOLVED

The Natural Gas Act, 52 Stat. 821, 15 U.S.C. 717-717w, provides in pertinent part:

Section 1(b):

> The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

STATEMENT

Respondent Pan American Petroleum Corporation (Pan Am), at various times from 1954 through 1959, acquired certain leasehold interests, in the Bastian Bay field offshore but within the state of Louisiana. In 1960, after finding oil and gas and constructing production and gathering facilities, it completed arrangements to transfer certain of those leasehold interests and facilities to Tennessee Gas Transmission Company (Tennessee) for an amount of about $159,500,000. At that time, no connection had been made between the production facilities and Tennessee's system.

In early 1961, Tennessee sought and received a budget-type certificate in Docket No. CP61-106. It subsequently constructed and began operating some 2.63 miles of 12-inch line to take gas from Bastian Bay into Tennessee's interstate pipeline system.

On April 6, 1961, the Commission reopened the CP-61-106 proceeding to determine whether it had authorized Tennessee's facilities which were taking gas from Bastian Bay (R. 1732). The order stated, "It appears that the Commission has no information whatsoever with regard to the factual situation involved . . ."

After initial hearings, the Commission on March 12, 1962, in Docket No. CI62-1034, ordered Pan Am to show cause why it should not be found to be selling jurisdictional gas from the Bastian Bay field, and consolidated this proceeding with Tennessee's (R. 1913). Further hearings were held on the consolidated proceedings (R. 484-904).

The examiner's decision, issued April 1, 1963, found the lease transaction to be a sale of natural gas in inter-

state commerce and the pipeline connection unauthorized (R. 1967-2007). The Commission's Opinion No. 413, issued December 12, 1963, affirmed these findings (R. 2147-2166). Its February 4, 1964 order denying rehearing granted a stay of requirements that Pan Am and Tennessee file appropriate certificate applications (R. 2223-4).

Pan Am's petition to the court below appealed the ruling on jurisdiction; Tennessee appealed this ruling and the additional ruling that its Bastian Bay connection was unauthorized. The court below reversed the Commission's orders on the jurisdictional issue, but affirmed its finding that the pipeline connection was not authorized.

REASONS FOR GRANTING THE WRIT

The question presented here is essentially the same as that now pending before the Court in *United Gas Improvement Company, et al. v. Continental Oil Company, et al.*, Nos. 644 and 693, this Term, in which certiorari was granted to the Fifth Circuit Court of Appeals on January 18, 1965. That case involves a transfer of leasehold interests in Rayne Field, South Louisiana.

The court below, in this case, erred in adopting the Fifth Circuit's finding that the transaction involved a "lease" as that term was used in *Federal Power Commission* v. *Panhandle Eastern Pine Line Company, et al.*, 337 U.S. 498 (1949). The Tenth Circuit regarded Pan Am's sale of its leasehold interest in proven gas reserves as a "conveyance" relating merely to simple acreage and facilities for production and gathering, not involving interstate commerce.

We submit that the court was wrong because it failed to note the distinctions between the Pan Am transfer and the *Panhandle* transfer, *supra,* and to recognize that the Pan Am transfer initiated the sale in interstate commerce of the gas reserves involved.

Panhandle involved a sale of undeveloped leases by a jurisdictional natural gas company to a buyer who was committed to sell the gas production solely intrastate. *Panhandle* did not involve the question of whether a transfer of leasehold interests could or could not constitute a sale of gas or whether it was a sale of gas in interstate commerce. This Court, in those circumstances, held that under the exemption of production and gathering in Section 1(b) of the Act, *supra,* the Commission had no authority over the disposition of undeveloped gas leases.

The subject transaction is a sale in interstate commerce for the following reasons: Pan Am is disposing of a large block of proven gas reserves; the buyer, Tennessee, is an integrated interstate natural gas pipeline company with the bulk of its markets outside the state in which the reserves are located. This transaction is, therefore, the initial step involving the sale of natural gas in interstate commerce.

The Act's purpose has been considered on a number of occasions by this Court and always found to be to protect consumers against unreasonable rates: e.g., "to afford . . . a complete, permanent and effective bond of protection from excessive rates and charges", *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378 (CATCO); for "protection . . . against exploitation at the hands of natural gas companies", *Phillips Petroleum Co.* v. *Wisconsin,* 347

U.S. 672. Under this clear interpretation, could Congress have intended an escape from regulation by the use of a device for transferring property or property rights bearing a label other than the term "sale"? Could Congress have intended that the Commission and the courts close their eyes to the interstate commerce aspect of a Pan Am type of transfer?

Just as the purpose of the Act is clear, the purpose of those seeking to escape regulation is clear. If successful, Pan Am and others similarly in a position to sell their leasehold interests in large proven gas reserves would extract the maximum return permitted by the demand for gas.

Notwithstanding the Fifth Circuit's observations that features of the Rayne Field transaction are not "unusual" or "uncommon," that transaction and similar ones which followed are unique and prove the intent of the sellers. The Rayne Field transfer was the first of its kind since producer regulation under the Act began. It was formulated when this Court's ruling in CATCO, *supra,* was handed down while the Rayne Field producers' applications for certification of initial sales under conventional contracts were pending before the Commission on exceptions to the examiner's decision. The examiner had recommended unconditional permanent certification at a price then in excess of any permanently certificated initial price. With the threat that CATCO would compel lowering of their price proposals, the producers withdrew their pending applications and entered into the same type of "lease transfer" as is involved in the instant case.

When the Commission initially found in its Opinion No. 322, 21 FPC 860, that it had no jurisriction over

this type of proposal, it precipitated four similar transactions. The aggregate price involved in these "lease transfers" was over $1.4 billion. Three of these, involving $390 million, are still in litigation. Strenuous opposition has led to abandonment of the other two proposals involving over $1 billion.

If the producers' attempts to evade regulation receive judicial sanction, the "lease transfer" device would become the dominant means of selling gas to natural gas pipelines.

CONCLUSION

The necessity to achieve the clear purposes of the Act requires the granting of the writ in this case.

Respectfully submitted,

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March 29, 1965

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NOVEMBER TERM, 1964

No. 7659

PAN AMERICAN PETROLEUM CORPORATION, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*,

PENNSYLVANIA PUBLIC UTILITY COMMISSION and
THE COMMONWEALTH OF PENNSYLVANIA, *Intervenors*.

On Petition to Review an Order
of the Federal Power Commission

Carroll L. Gilliam, Washington, D. C., (J. P. Hammond, Karl R. Goldsmith and Clifford O. Stone, Jr., Tulsa, Oklahoma, William J. Grove, Washington, D. C., and O'Bryan, Grove, Paglin, Jaskiewicz, Sells, Gilliam & Putbrese, Washington, D. C., Of Counsel, were with him on the brief) for Petitioner.

Howard E. Wahrenbrock, Solicitor, (Richard A. Solomon, General Counsel, Robert L. Russell, Asst. General Counsel, and Israel Convisser, Washington, D. C., were with him on the brief) for Respondent.

Before MURRAH, Chief Judge, and PHILLIPS and LEWIS, Circuit Judges.

LEWIS, Circuit Judge.

Pan American Petroleum Corporation seeks review under section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), of an order of the Federal Power Commission wherein the Commission assumed jurisdiction under section 7 of the Act over a transaction between Pan American and Tennessee Gas Transmission Company, the latter com-

pany being an interstate natural gas pipeline company. The dispositive question is whether the subject transaction constituted an assignment of oil and gas leases and was thus exempt under section 1(b) of the Act,[1] FPC v. Panhandle Eastern Pipeline Co., 337 U.S. 498, or a sale of gas for resale in interstate commerce and so was under the regulatory cognizance of the Commission, Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672.

During the years 1954 through 1959 Pan American acquired twelve leases upon what was initially undeveloped acreage in what is now known as the Bastian Bay Field in Plaquemines Parish, Louisiana. In December, 1955, an exploratory well was completed and thereafter a total of 32 wells were drilled upon six of the leases by Pan American either as wholly owned wells or in conjunction with others sharing operating rights. No wells were drilled upon the other six leases. Although the field was proven, Pan American made no sales for consumption, did not connect the wells to an interstate transmission pipeline or collection facilities and did not establish any permanent production units. Such quantities of gas as were produced were flared or consumed in the field.

On December 1, 1960, Pan American conveyed its interests to Tennessee for a stated price of $159,463,500 pursuant to a contract designated as a Lease Sale Agreement and consummated by an "Assignment and Conveyance." Of this price, Tennessee paid $9,427,104 at the time of transaction and obligated itself for seventeen further annual payments evidenced by promissory notes. The agreed price was based upon estimated reserves and provided for re-determination of the reserves upon the request of either party between 1969 and 1973, and for adjustment of the purchase price on the basis of such determination. The

[1] Section 1(b) provides, *inter alia*, that the Commision's jurisdiction shall not reach "facilities used for . . . . the production or gathering of natural gas." 15 U.S.C. § 717(b).

pricing formula was equated to 21¢ per Mcf for the reserves attributable to the interest assigned. Tennessee agreed to develop and produce the leases and to negotiate contracts with royalty owners for the payment of royalties and reimbursement of Louisiana severance taxes. And the assignment was subject to the following reservations: (1) Pan American retained its rights in minerals other than natural gas, oil, and other petroleum liquids; (2) Pan American retained its rights in the leases below the bottom of the deepest presently-known productive horizons; (3) Pan American reserved as a production payment all proceeds received by Tennessee from the sale of oil produced on the leased acreage, such payments to terminate when 85 per cent of the recoverable reserves of oil have been produced; (4) Pan American reserved a similar production payment for proceeds received by Tennessee from the sale of separator liquids, with detailed provisions relating to the deduction of Tennessee's costs and expenses; and (5) Pan American retained the right to process all gas produced from the assigned leaseholds, including that attributable to certain outstanding royalty interests, for recovery of natural-gas liquids, agreeing to pay Tennessee for plant losses and use of gas as fuel.

Approval of the transaction was neither obtained nor sought from the Federal Power Commission. In 1961, Tennessee constructed a 12-inch connecting pipeline from the field to that company's main interstate transmission system. See Tennessee Gas Transmission Co. v. FPC, No. 7751, 10 Cir., this day decided.

In substance, the contractual provisions of the Pan American-Tennessee agreement are not legally distinguishable from those considered by the Fifth Circuit recently in Marr v. FPC, 336 F. 320. There, as here, the thrust of the Commission's argument to support its claim of jurisdiction lies in its conclusion that the ultimate benefit that accrues to Tennessee is the acquisition of dry gas; that

the legal effect of an instrument should be determined from the actuality of the transaction; that Congress intended that the Commission have all necessary powers to regulate the sale of gas in commerce effectively and that, absent jurisdiction of the subject and similar transactions, a regulatory gap exists which defeats the intended purposes of the Commission's creation. Such arguments are but a denial of the Supreme Court decision in *Panhandle*, supra, and can find no comfort in that court's later decision in *Phillips*, supra. The basic distinction between conveyances relating to simple acreage and facilities for production and gathering, over which the Commission has no jurisdiction, and the sale of gas in interstate commerce, over which the Commission does have jurisdiction, is not determined by nor dependent upon the contemplated but unrealized benefit to the parties. The conveyance must trigger the sale of gas in interstate commerce, not just shade the background. Saturn Oil & Gas Co. v. FPC, 10 Cir., 259 F. 61, 68, cert. denied, 355 U.S. 956. And the parties may deliberately avoid the jurisdiction of the Commission by remaining beyond the bounds of interstate commerce or within the exception to the Commission's regulatory powers in such commerce. Sunray Mid-Continent Oil Co. v. FPC, 10 Cir., 270 F. 404, 409.

Our inquiry, then, must determine whether the Pan American transfers were leases within the compulsion of *Panhandle*. We conclude, as did the Fifth Circuit in *Marr*, that the subject conveyances were leases and consequently not within the Commission's jurisdiction under section 7 of the Act but were exempt under section 1(b). We are in complete accord with the views expressed by Judge Rives in his able opinion in *Marr* and find them to be equally applicable to the case at bar.

The orders are reversed and the cause remanded to the Commission for further proceedings consistent with the views here expressed.

APPENDIX B

Judgment

Thirty-Second Day, November Term, Wednesday, December 30th, 1964.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Orie L. Phillips and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on petition to review orders of the Federal Power Commission and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the orders are reversed and the cause remanded to the Federal Power Commission for further proceedings consistent with the views expressed in the opinion of the court.